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Section 3, Remarks:**REMARKS**

Reexamination and reconsideration of this application is respectfully requested in view of the above Amendments to the Claims and the following Remarks.

20 claims remain in this/her case. Claims 21 – 23 have been added in favor of canceled claims 8 – 10. Claim 7, as amended includes new subparts b) through d) which are the substance of the canceled claims 8 – 10.

Claim Amendment Support; No New Matter; Response to 101 and 112 Rejections:

New claims 21 – 23 complete the suite of claims for more adequate coverage of the inventive method of claims 1 and 2. Claim 21 and 22 are identical except for the dependency, being dependent from claims 1 and 2, respectively. They recite the transparency feature disclosed in several places in the Application (see for example the Summary and the Abstract, that is, as the orthogonally addressable cells or pixels become smaller the overlay becomes increasingly transparent in that smaller and smaller details can be “boxed” in the topological subdivision regions. Thus, for a non-limiting example, on some drawings the overlay grid can be quite large, say for coverage of external features, such as the floor of an outdoor stadium, yet on other drawings the grid can be quite small or “fine” so that closely packed objects or elements of construction can be individually boxed or bounded.

New claim 23 covers two modes of use of an error detection algorithm: a) contiguity and non-duplication is described, for example, at page 10, lines 3 – 15, and page 11, line 20 through page 12, line 2. Topologically proving the completeness and non-duplication of the boxes is disclosed at page 10, line 7. The second mode: b) the use of summation, is disclosed, *inter alia*, at page 13, lines 15 – 22, the Application stating: “a summation file of the overlays for a particular plan sheet may be compiled, preferably with both plan sheet and summation in a comparable digital format. A cross correlation or comparison between the summation file and the plan sheet is preferably performed to determine that no element of the plans has been inadvertently overlooked (completeness check functionality).”

The amendments to the claims have been made upon a careful review of the 3rd Office Action dated January 3, 2005. It became evident from the 101, 112 and 102/103 rejections that the Office had some difficulty in understanding the invention.

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By way of support for the amendments, in general, the Office is requested to review in detail the 5 separately described modes of creating topological overlay subdivisions in the Application. The subdivisions, although termed regions or boxes, they can also be thought of as cells or pixels, and include curved outline regions, as clearly disclosed in the Application. Please review the 5 different modes on page 9, line 1 through page 14, line 5. These modes are: 1) Box Subdivision; 2) Trace Path Subdivision, particularly suited for distributed elements, such as wiring, plumbing, heating elements; 3) Zoom View Subdivision; 4) Grid Block Subdivision; and 5) Functional Overlay Subdivision. Applicant believes that once the Office reviews and comprehends the process, the term "topological" will become less mathematical and the inventive method will be seen to be the permitted and patentable use of computers, algorithms, coordinates and digital linking in a technological art to produce a useful, concrete and tangible result.

Although the statutory nature of claims 1 and 6 – 8 is obvious to Applicant, because of the Section 101 rejection of those claims, main claim 1 was amended to specifically recite in the preamble the useful, concrete and tangible results of precision, completeness and quality control, and to specifically call out the technological arts (architecture, construction and computer operations). The comment in the Office Action at page about being able to carry out the process in one's head or by pencil and paper is irrelevant and does not adhere to the Guidelines quoted above in Section 1 of this/her Response. For a more detailed response, Applicants arguments in the Response to the Second Office Action, the Response being dated August 9, 2004, at pages 10 – 14 is hereby incorporated by reference in order to not burden the record in this case. However, to the extent the Office persists in a 101 rejection, the burden is on the Examiner to respond to the legal arguments given, rather than ignoring them.

In response to the 112 rejection of claims 16 – 20, those claims were amended to introduce formal steps language of establishing and operating the website and providing and configuring the computer data processing system that hosts the site. Please note that business method claims are also considered to be "system" claims, and thus the rejection was inappropriate. However, in an attempt to move the case along in prosecution, this case having been pending 5 years, rather than contest that issue, it is simpler to add the action language, there being no substantive difference in the approaches.

A careful review of the Specification, including the Appendix and the drawings will show

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that no new matter has been added by the amendments to the claims.

For example, please consider the language of the Abstract, the Field of the Invention and the Summary of the Invention, which recites, *inter alia*, language of: “contracts and subcontracts”; “defining the detail” of the work; “full, clear and unambiguous definition” of the work; eliminating “errors and uncertainty relating to contract performance”; “electronic overlays to the digitized construction plans”, the overlays being “divided into a series of optimized topological subdivisions or ‘boxes’” also called cells or pixels formed by the overlay grid; the boxes “uniquely identify and locate on the plans a portion of the work to be performed”; “linkage of the overlays and boxes to the subcontracts” whereby the work to be bid is accurately “‘mapped’ to corresponding regions and overlay category on the architectural drawings or construction plans”; the “mapping of overlays to plans” constitutes a system of “almost-orthogonal equations”, which in turn have “the property of progressively increasing transparency as the typical size of the subdivisions is reduced”, the size also being accurately described as increasing fineness; “bi-directional flow of information from the various entities involved”; “permitting more efficient and effective monitoring and management of contract performance”; “Internet-based embodiments”; “a central-server remote host Internet embodiment in which the transmittal of data, including plans, overlays, contracts, bids, comments, edits, changes and the like are via the Internet”, the bid system being operated on a central remote host operated by a Service Provider.

The invention relates to “computer-assisted construction bidding and contract administration”, the orthogonal cell overlay system “permits increasing the detail specificity of the work scope as the degree of subdivision of the plans increases, thus eliminating errors and uncertainty relating to the performance of construction contracts. The bi-directional flow of information as described in the Summary and Detailed Description sections of the Specification and Drawings is clearly interactive.

The Summary describes the inventive “computerized” system as being “interactive” and solving “the problems of the traditional bidding process” and integrating that process into an “Internet-based construction management business”. A series of “overlays” is established by the computerized system which “provides a representational “surface”, aligned and oriented to the plans, upon which the detail nature of the work to be performed in a particular trade or category may be precisely topologically defined.” The Summary goes on to describing the association and

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mapping of the overlays on the "architectural drawings or construction plans", and that they are then linked to the contracts to provide "early detection and corrections of errors, omissions, ambiguities or inconsistencies of the plans."

Under the heading "Bid System Principles", understanding that we are talking about a computerized system, is described "the set of overlays containing identified regions", which can be termed "cells" or "pixels", and the mathematics is described, including the "one-to-one mapping point-to-point" as relating to transparency, concluding that "as the area of the region [think cell or pixel, or fineness of grid] is reduced, the degree of precision increases and the potential degree of ambiguity decreases. Under the system and method of the invention, "the size and boundary location [think coordinates] of each subdivision may be selected to obtain the degree of specificity needed to *completely* identify and define the scope of work for any given element of the project work" (underlining supplied). Please note, Original Claims are part of the Application and can be relied-on for support; note the term "reference grid coordinate" in original claim 10.

With this sample of quotations out of the Application, and in order to not simply reproduce it here, it is clear that the amendatory language and concepts described by that language are well established in the Application and no new matter has been introduced.

Response to the 102 and 103 Rejections of the Claims:

The claims do not stand or fall together, and failure to distinguish between them is a failure of the obligation of full examination. In contrast, all the substantive rejections are based on Casto, 6,038,547, alone or in combination with Wang, the press release of PNCBank and Bezos 6,029, 141. If Casto falls, all the rejections must be withdrawn. If any one of Wang, PNC Bank or Bezos falls, then the rejections of claims 5 and 16 – 20 fall.

Patentable methods and programs may include reference to mathematical algorithms:

The mere fact that the claims reference mathematical algorithms or the digital manipulation of data does not thereby render them unpatentable, where the algorithms or data are applied to produce a useful, concrete, tangible result.

For example, claims drawn to a long-distance telephone billing process containing mathematical algorithms were held to be patentable subject matter because "the claimed process applies the Boolean principle to produce a useful, concrete, tangible result without pre-empting other uses of the mathematical principle." AT&T Corp. v. Excel Communications, Inc., 172

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F.3d 1352, 1358, 50 USPQ2d 1447, 1452 (Fed. Cir. 1999).

In another example, "[T]ransformation of data, representing discrete dollar amounts, by a machine through a series of mathematical calculations into a final share price, constitutes a practical application of a mathematical algorithm, formula, or calculation, because it produces 'a useful, concrete and tangible result' -- a final share price momentarily fixed for recording and reporting purposes and even accepted and relied upon by regulatory authorities and in subsequent trades." State Street, 149 F.3d at 1373, 47 USPQ2d at 1601.

Thus, here, to the extent a mathematical algorithm may be employed to assist in defining the overlay cells and/or the capture cells underneath that delimit on the drawings the many trade-related elements of the many plan sheets, it is but one element in achievement of a clearly useful, concrete and tangible result, namely the early detection and correction of errors, omissions, ambiguities or inconsistencies of the plans before the construction begins by linking the relevant contracts to defined and delimited elements on the plans (the subdivision regions, cells, pixels, or however termed) ordered by subcontractor area of responsibility. The instant invention clearly meets the State Street test.

The claims must be evaluated in light of the full disclosure:

The Office must assess the patentability of Claims 1- 7 and 11 -23 in the light of a full and thoughtful reading of the entire disclosure to determine its practical application and its useful, concrete and tangible results. The meaning of the terms of the claims must be determined by reliance on the applicant's disclosure, Markman v. Westview Instruments, 52 F.3d 967, 980, 34 USPQ2d 1321, 1330 (Fed. Cir.) (en banc), affirmed, U.S. , 116 S. Ct. 1384 (1996). Furthermore, claims must be given their broadest reasonable interpretation in light of the supporting disclosure. In re Morris, 127 F.3d 1048, 1054-55, 44 USPQ2d 1023, 1027-28 (Fed. Cir. 1997).

A claim must be evaluated in light of all the limitations:

The claims must be evaluated for patentability in light of every limitation in the claim. The Office may not dissect a claimed invention into discrete elements and then evaluate the elements in isolation. Instead, the claim as a whole must be considered.

"In determining the eligibility of respondents' claimed process for patent protection under 101, their claims must be considered as a whole. It is inappropriate to dissect the claims into old and new elements and then to ignore the presence of the old elements in the analysis.

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This/her is particularly true in a process claim because a new combination of steps in a process may be patentable even though all the constituents of the combination were well known and in common use before the combination was made." **Diamond v. Diehr**, 450 U.S. at 188-89, 209 USPQ at 9

Clearly, in assessing the practical application, and useful, concrete, tangible result of a claim, the Office is required to treat **each** of Claims 1- 7 and 11 - 23 as a whole, in light of all its limitations, steps and elements, not just focusing on a specific digital process step or computer-related element. As discussed above, the claims, each treated in its entirety and read in light of the specification herein, provide a practical application, produce useful, concrete, tangible results, and are not taught or suggested by the cited art of record.

Based on the forgoing analysis, Applicant submits the rejections of Claims 1- 7 and 11 - 23 are unsound under 35 USC 102 and 103 and that these rejections should be withdrawn.

Discussion of the References with Respect to the Rejections Under Sections 102 and 103:

Applicant will discuss the references in detail below, showing that Casto is irrelevant to the claimed method, the program and the business method, and that the secondary references of Wang, PNCBank and Bezos, while historically somewhat interesting, fail to cure the defects in Casto and do not, alone or in combination teach or suggest the claimed inventions.

In addition, in sections relating to the case law, Applicant will show that the Examiner has not discharged his/her legal duty of providing factual support for the rejections independent of the teachings in Applicant's specification.

The prior form of claims 1 - 4 and 6 - 15 were rejected under 35 USC 102(e) over Casto 6,038,54 and claims 5 and 16 - 20 were rejected under Section 103 in view of Wang, PNCBank and Bezos. Even applied to any of the claims presently in the case, it is clear that Casto does not anticipate nor render obvious any of the rejected claims within the meaning of 35 USC 102(e) and 103, taken alone or in combination with Wang, PNCBank and Bezos.

It is clear that the disclosure of Casto has been misapplied to the claims of the present case. Most importantly, the disclosure of Casto does not, either in Casto's disclosure of his/her inventive subject or in Casto's discussion of prior art, in any way references the topological subdivision of construction plans in any manner for any purpose. Nor is there any reference to electronic overlays, orthogonal coordinates, the use of subdivision regions or cells to uniquely bound and delineate a

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portion of the work on the construction project, by trade, on the plan sheets. Nor is there any reference to linking the overlay-defined regions or cells to a contract, and the incorporation of the defined element into the contract. The same is true of the secondary references: they are silent on these claimed features, processes and computer program elements.

It is also clear, and very significant that none of the cited references disclose or teach steps or systems that reduce errors, omissions and uncertainty in the bidding process for construction projects. Those references are directed to entirely different processes to solve entirely different problems and to produce entirely different results.

The Second Office Action treats as trivial the critical fact that Casto, by its terms, categorically omits grid or orthogonal-type overlays for plan drawings, their use to create topological subdivision regions or cells that define, bound and delimit construction objects and elements, and the linking of the identified drawing elements to the contracts and incorporating them in contracts.

The Office Action is hung up over Casto's use of the term "region", failing to distinguish that his use of the term is entirely different from Applicant's use of the term. Casto does not create "regions", nor does he use them. Rather, the regions in Casto are defined by the Architect and merely define areas on a real construction site that the reviewer must go to in order to determine if work has been done. Casto's regions are simply addresses. In Fig 3 of Casto, as detailed below, a region is simply an apartment or condo address: Sandburg Village, James House, 39th Floor, Unit 15; go check to see if the wiring has been completed so the Electrical Sub can be paid (if he has submitted his Waivers of Lien forms). That Casto "region" is not a topological subdivision created electronically on plan sheet drawings and thereafter linked into a particular contract. Applicant has shown 5 exemplary methods (many more are possible) of use of overlays to create "subdivision regions" of plan sheets, none of which are taught or suggested in Casto.

Rather, and entirely improperly, the Office Action quotes from the claim and then cites column and line from Casto that purports to state the quoted claim language. That is wrong, because Casto cannot and did not describe the solution to a problem that Casto did not know even existed, much less solved. In all claims of the present application there are method steps or elements of a combination based squarely upon the definition and useful application of such elements and features: the overlays, the topological subdivision regions, the linking and incorporating of the plan

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selected elements into the relevant contracts. These distinctions over Casto recited in the claims of the present Application are not trivial, but rather are central and material.

In particular, it serves no useful purpose to refute line by line the Office Action reference to the citations in Casto, because they do not reference the elements as claimed presently.

What is more significant is for the Office to understand that Applicant's invention has application PRE-CONSTRUCTION, indeed pre-contract execution, being a new system for reducing errors and omissions in bidding, while Casto is an aid to the standard, well known, POST-CONSTRUCTION WORK inspection and verification process as part of the pay-out of sub-contractors.

That is, Casto is NOT relevant to any activity PRIOR TO the sub-contractor actually doing his work. The sub-contractor does not get paid until at least part of the work has been completed. That is well after the bidding process where errors occur, as set forth in the Background of the Application. It is in reducing the errors and omissions, and enhancing the precision, clarity and completeness of the bidding package that is a focus of Applicant's invention.

The Office Action refers to Casto's "section, level and region" partitioning. That is not the same as an overlay or its use to create a "subdivision region" to identify, delineate and locate a particular trade-related construction element or object. Indeed, even "partitioning" is NOT a function of Casto's process or program. The Architect does that independently of Casto. Look at Casto's Fig 3; that is simply a condominium, by way of example. As each "region" (unit address) in Casto's Fig. 3 Condo is owned by a different owner, the accounting for the completed construction must be done on a condo-by-condo (region-by-region) basis, at the various payout stages (most conventional contracts have from 3 - 7 payouts, although large projects may have more). The verification of the amount of work done, an accounting function, is done on site by a "reviewer" (the architect or person involved in the payout approval process, e.g., a contractor doing the verification that his subs have completed what they say they have done) on a condo-by-condo basis. Of course the reviewer has to go through each condo or apartment separately, since each owner may have different specifications. Casto admits that it has been the practice in the past to verify if the work had been done in each region on separate index cards (Col 5, line 3).

All Casto has done is to create a Word or Excel document that mirrors the standard AIA

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G702 and G703 forms, so they are fillable by the reviewer on the site, that is, in each condo or apartment "region", during the inspection. And, wonder of wonders, Casto manages to add up all the subcontractor's claims for payment into one document that relates to one region! Casto describes this addition function in Col 5, lines 63 – 65 as "The consolidated reports are generated region-by-region by including work done by each (sub)contractor on the index card or report form associated with that region." The "consolidation" is simply a sum, and the term "including" means the process of addition, both of which are conventional Excel spreadsheet functionality.

As set forth in Casto in Col 7, lines 7 – 10, the reviewer physically goes to the condo (called a "region") to see what was (past tense) done (the physical construction work) by the (sub)contractor, in order to verify whether the sub should be paid, and if so, how much. The "Change Orders", "Retainage" and "Certificates for Payment" are not Casto's invention; those are standard terms of AIA contracts used since the 1970's if not earlier (we believe long earlier), but in any event prior art as to Casto.

The net is that Casto is a post-work-done verification and standard form filling-out system. It does nothing to address the Pre-bid error and omission problem addressed and solved by the claimed invention of Applicant.

Casto is simply not relevant. And the Office is challenged to show where Wang directed to a scanner, and PNCBank directed to post construction appraisals, and Besos directed to the Amazon.com one click order system for books and merchandise, cure the defects of Casto. Where do these references do anything to direct Casto to an upstream problem that none of the references even consider exists. If the reference does not know the problem exists, it cannot teach a solution.

That is, Casto is silent on the problem and solution claimed. The Office cannot base a proper rejection on the silence of a reference.

Indeed, PNCBank is a press release, directed to what the system will do, and is clearly not a teaching of how to accomplish the alleged functionality. It is a "that" publicity release, not a "how-to" teaching. As such it does not rise to the level of a complete disclosure on which a rejection can be based.

However, it is absolutely transparent that the Office Action has not analyzed the claims with sufficient care to discern the inventive nature of the claimed method (or for that matter the program or Internet-based business method). Indeed, it is clear that the Office Action merely dismisses the

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claimed method as some sort of use of a computer with respect to some aspect of construction. In short, the Examiner merely "deems" the invention disclosed within the meaning of 35 US Code §102 or taught within the meaning of 35 US Code §103 by any reference that discloses a database in relation to a set of construction plans. Such a broad brush approach to rejections is improper under the applicable Court decisions, as noted below.

Merely invoking the prior existence of the Internet does not provide any suggestion or teaching in this/her regard either. Applicant submits that method, system or programs of the rejected claims are novel and non-obvious with respect to the teachings of prior art internet commerce, and that the Examiner has not followed the applicable law.

The conclusory, unsupported assertion that the rejected claims would be obvious over the disclosure of Casto in light of the Internet is irrelevant and improper, as shown by the discussion of the pertinent law, below. The Office Action fails to show what elements in Casto could function in light of the Internet to carry out the method steps of the claims. Thus, the Office Action is relying on opinion. Even enabling Casto via the Internet does not create the claimed method, program or business system. As stated in the Response to the Second Office Action, the Office, in making the rejections, ignores the real problem of the topological issues between the construction plan sheets and the contracts that is solved, elegantly so, by the inventive process, system and computer programs. This achievement is not obvious in light of Casto taken alone or in combination with the secondary references, and is a significant step forward in the art that is deserving of a patent.

It is clear that the 103 Rejection totally fails to point to any teachings in any of the references for any suggestion to combine the references. Nor does any purported combination teach or suggest the features claimed. The 102 and 103 Rejections are clearly inappropriate and should be withdrawn.

The Examiner's Improper Use of Phantom Prior Art:

Applicant has noted above the lack of pertinence (that is, the lack of relevance) of Casto, and that reliance on silence in a reference to assert teachings to support 102 and 103 rejections, without substantiation, is not the law.

Consider what the law really is: The Court stated in *In re Cofer*, 148 USPQ 268 at 271 (CCPA):

"Necessarily it is facts appearing in the record, rather than prior decisions in and

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of themselves, which must support the legal conclusion of obviousness under 35 USC 103. Merely stating that a compound or composition is obvious, without adequate factual support, is not sufficient.”

Thus, the reliance by the Examiner on phantom prior art, a mere statement of opinion by the Examiner that the claimed invention is taught or obvious without a shred of factual support is improper.

It amounts to the Examiner deeming the claimed invention is obvious, a reliance on phantom prior art. The Board of Patent Appeals and Interferences does not condone that approach, stating in Ex parte Stern, 13 USPQ 2d 1379 at 1381:

“The examiner should be aware that “deeming” does not discharge him from the burden of providing the requisite factual basis and establishing the requisite motivation to support a conclusion of obviousness. [Citing cases] The examiner’s reference to unidentified phantom prior art techniques falls far short of the mark. [Citing cases] Accordingly, the examiner’s rejection of the appealed claims under 35 USC 103 as unpatentable over any of the primary references, considered singly, is reversed.”

Similarly, both the 102 and the 103 rejection here should be withdrawn as lacking any factual basis. Blatantly obvious glossing over what the references in fact disclose amounts to misrepresentation and is not support for the rejections. That does not discharge the Examiner’s burden of presenting factual evidence.

The Examiner Improperly Uses Applicant’s Specification as Prior Art:

In referring to the general development of the Internet, and use of it for accounting, appraisal or ordering purposes (Casto, PNCBank and Bezos) the Examiner is in essence saying that the Internet is a well known tool, and accordingly it could be modified to operate in the manner claimed.

In order to make that assertion, the Examiner improperly applies a “could be modified” standard, and finds direction for the modification, not from the teachings of the references or the development of the Internet, but from Applicant’s own specification. Neither are proper.

The fundamental principle, as articulated by the Court of Appeals for the Federal Circuit in In re Gordon, 221 USPQ 1125 (Fed. Cir. 1984), is that the prior art must suggest the combination

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of references. In **Gordon**, the Court rejected the idea that the prior art devices could be modified to produce the claimed device as a proper basis for an obviousness rejection, holding the combination is not proper unless the prior art suggests the desirability of such a modification.

In **SmithKline Diagnostics, Inc. v. Helena Laboratories Corp.**, 8 USPQ2d 1468 (Fed. Cir. 1988), the Court held that to pick and chose elements from references to recreate the invention is not proper. And in **Northern Telecom, Inc. v. Datapoint Corp.**, 15 USPQ2d 1531 (Fed. Cir. 1990), cert. denied, 498 U.S. 920 (1990), the Court held that “[i]t is insufficient that the prior art disclosed the components of the patented device, either separately or used in other combinations; there must be some teaching, suggestion, or incentive to make the combination made by the inventor.” (Emphasis added).

These governing principles were applied by the Court in holding both of the obviousness rejections in **In re Bond**, 15 USPQ2d 1566 (Fed. Cir. 1990) and **In re Mills**, 16 USPQ2d 1430 (Fed. Cir. 1990) were in error, and reversed the Office. **In re Mills** specifically held that although the prior art device could be modified to run the way the applicant's device was claimed to run, “there must be a suggestion or motivation in the reference to do so”, 16 USPQ2d at 1430. Since there was none, the rejection was in error and was reversed.

More recently, in **Sensonic, Inc. v. Aerosonic Corp.**, 38 USPQ2d 1551 (Fed. Cir. 1996), the Court reiterated this/her principle, holding there was no teaching or suggestion in the prior art that would have led a person skilled in the art to select the specific mechanical and electrical structures and concepts and combine them in the manner of the invention of that case.

As a further principle, both the Courts and the Board of Appeal have long held that the suggestion for the combination in the references cannot come from the Applicant's Specification, see, for example, **Ex parte Brack**, 134 USPQ 445 (PODA 1961). The reason is simple: Applicant's Specification is not prior art. **Applicant's specification cannot be used as a parts-list to search for disparate parts in the art, and then used as a blueprint to assemble the selected parts.** The sources for the motive not only to select the method, the program and the internet business method, but also the direction for reassembling them into the claimed combinations to obtain the claimed results, must come only from the references.

These principles were violated in the Office Action. The rejections are contrary to the applicable principles of law governing the Office, and should be withdrawn. The Office is required

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by law to address these principles and show how they have been followed in any future rejections of the claims.

CONCLUSION

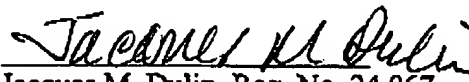
Applicant submits that Claims 1- 7 and 11 - 23 are in fact patentable within the meaning of 35 USC Sections 101, 112, 102 and 103, and that in particular that these claims comply with the guideline for computer-implemented inventions of MPEP Sec. 2106.

It is Applicant's view that this/her Application is now in complete condition for allowance and favorable action is urged. In the event that there remain open issues, or the Examiner does not concur and withdraw the rejections, the Examiner is requested to contact undersigned counsel for Applicant for a telephone Interview to discuss the issues in order to advance this/her case to issue.

Please note that this case has been pending 5 years, and that it is or should be Special.

Respectfully submitted,
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Date: May 2, 2005

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End of Section 3, Remarks.

End of Response to Office Action.